Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	IB Docket No. 96-111
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	CC Docket No. 93-23 RM-7931
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite	File No. ISP-92-007

REPORT AND ORDER

Adopted: November 25, 1997 Released: November 26, 1997

By the Commission: Chairman Kennard issuing a statement.

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I. INTRODUCTION AND SUMMARY

A. Introduction

1. Today, we take an historic step by implementing the market opening commitments made by the United States in the World Trade Organization (WTO) Agreement on Basic Telecommunications Services (WTO Basic Telecom Agreement).[1] The WTO Basic Telecom Agreement, which will take effect on January 1, 1998,[2] is the culmination of the efforts of the United States and 68 other WTO Members to bring competition to global markets for telecommunications services, including satellite services. The WTO Basic Telecom Agreement is centered on the principles of open markets, private investment, and competition. It covers nations that account for 90 percent of worldwide telecommunications services revenues. By opening markets worldwide, the WTO Basic Telecom Agreement will allow new entrants to deploy innovative, cost-effective technologies, and thereby advance the growth of satellite services around the globe.

2. We are optimistic that global implementation of the WTO Basic Telecom Agreement will result in significant worldwide benefits to consumers and providers. At the same time, we recognize that much work needs to be done to ensure that the promise of the WTO Basic Telecom Agreement is fulfilled. With this *Report and Order* and the companion *Foreign Participation in the U.S. Telecommunications Market Report and Order*,[3] which we also adopt today, we have implemented the letter and the spirit of the market-opening commitments made by the United States. We expect that foreign entities will begin to enter and compete in the U.S. market soon after January 1, 1998. We also expect that U.S. providers will likewise be able to enter and compete in previously-closed foreign markets.

3. Under the terms of the WTO Basic Telecom Agreement, the United States has committed to allow foreign suppliers to provide a broad range of basic telecommunications

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[1] As described below in Section II.B., the results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS (April 30, 1996), 36 I.L.M. 336 (1997) (the "Fourth Protocol to the GATS"). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

[2] *See* ¶ 3 of the Fourth Protocol to the GATS.

[3] *Foreign Participation in the U.S. Telecommunications Market Report and Order*, FCC 97-398 (rel. November 26, 1997) (*Foreign Participation Order*).

services, including satellite services, in the United States. In return, most of the world's major trading nations have made binding commitments to move from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services. In this *Report and Order*, we implement the U.S. Government's commitments to provide access to the U.S. market for satellite services by establishing a framework for assessing applications by foreign satellite systems to serve the United States.

4. The common sense policies and rules we adopt will produce substantial public interest benefits for U.S. consumers. First, they will facilitate greater competition in the U.S. satellite services market. Enhanced competition in the U.S. market, in turn, will provide users more alternatives in choosing communications providers and services, as well as reduce prices and facilitate technological innovation. In addition to encouraging a more competitive satellite market in the United States, this new environment will spur development of broader, more global satellite systems. These advancements will foster greater global community benefits by providing users increased access to people, places, information, and ideas worldwide.

5. In our companion *Foreign Participation Order*, we take parallel steps to carry out the market opening commitments made by the United States in the WTO Basic Telecom Agreement. That order establishes a framework for facilitating entry into the U.S. market by foreign entities for provision of telecommunications services (other than satellite services). As in our companion order, in this *Report and Order* we adopt for satellite services an approach that encourages foreign entry. Both decisions are guided by the common objective of promoting competition in the U.S. market, and achieving a more competitive global market for all basic telecommunications services.

6. While the United States was negotiating the WTO Basic Telecom Agreement, the Federal Communications Commission (Commission) was exploring measures to increase opportunities for foreign entry in the United States satellite services market. The Commission began this proceeding in May 1996 by issuing a *Notice of Proposed Rulemaking*.[4] As described more fully below, the *Notice* proposed a uniform framework for permitting foreign-licensed satellite systems to serve the United States. Adopted when only a few of the world's satellite markets were open to competition by U.S. providers, the *Notice* proposed to evaluate the effective competitive opportunities (ECO) in the country in which the foreign satellite was licensed (the ECO-Sat test) prior to granting an application to serve the United States. After the conclusion of the WTO Basic Telecom Agreement, the Commission issued a *Further Notice of Proposed Rulemaking* revising its proposals based on the market-opening changes

[4] *In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Notice of Proposed Rulemaking, 11 FCC Rcd 18178 (1996) (*Notice* or NPRM).

that will result from the Agreement.[5] Both the *Notice* and the *Further Notice* reflect our continuing goal to foster development of innovative satellite communications services for U.S. consumers through fair and vigorous competition among multiple service providers, including foreign-licensed satellites.

7. Specifically, today we adopt a framework under which we will consider requests for access by non-U.S. licensed satellites[6] into the United States. As required by Title III of the Communications Act of 1934, as amended (Communications Act), we will examine all requests to determine whether grant of authority is consistent with the public interest, convenience and necessity.[7] In making this determination, we will consider public interest factors such as the effect on competition in the United States, spectrum availability, eligibility and operating requirements, as well as national security, law enforcement, and trade and foreign policy concerns. We adopt a presumption that entry by WTO Member satellite systems will promote competition in the U.S. satellite services market. Opposing parties may rebut the presumption by showing that granting the application would cause competitive harm in the U.S. satellite services market. Although we find that license conditions will almost always provide sufficient protection against anticompetitive conduct, we recognize the possibility that circumstances might arise in which conditions might not adequately constrain the potential for anticompetitive harm in the U.S. market. In such an exceptional case, where grant would pose a very high risk to competition that cannot be cured by license conditions, the Commission reserves the right to deny an application.

8. We also will apply the presumption in favor of entry to affiliates of intergovernmental satellite organizations (IGO) licensed by WTO Members. For applications from COMSAT to provide U.S. domestic service via INTELSAT or Inmarsat satellites, we will require COMSAT to waive its immunity from suit and demonstrate that the service will enhance competition in the U.S. market. For satellites licensed by non-WTO Members and for all satellites providing Direct-to-Home (DTH), Direct Broadcasting Satellite (DBS), and Digital Audio Radio Services (DARS), we will examine whether U.S. satellites have effective competitive opportunities in the relevant foreign markets to determine whether allowing the foreign-licensed satellite to serve the United States would satisfy the competition component of the public interest analysis.

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[5] Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Further Notice of Proposed Rulemaking, FCC 97-252 (released July 18, 1997) (*Further Notice* or FNPRM).

[6] Throughout this *Report and Order*, the phrase "non-U.S." satellite system or operator means one that does not hold a commercial space station license from the Commission. By contrast, a "U.S." satellite system or operator means one whose space station is licensed by the Commission.

[7] 47 U.S.C. § 301, *et. seq.*

9. The new structure we establish today is based on consideration of over 100 comments submitted from parties around the world over the course of more than a year and is grounded in the public interest requirements of the Communications Act and the procompetitive principles of the WTO Basic Telecommunications Agreement. It sets forth criteria for entry into the United States by various types of non-U.S. satellites, delineates the Commission rules that will apply, and describes in detail the procedures for applications to provide service in the United States using a non-U.S. licensed satellite. This framework will largely replace the Commission's current approach of reviewing applications involving foreign-licensed satellites based on the individual circumstances before it. We expect that our new framework will encourage and ease entry by non-U.S. satellites into the U.S. market and that the occasional request we receive today involving a foreign-licensed satellite will become more common. We plan to look carefully at market opening measures enacted by the rest of the world.

B. Executive Summary

10. *Policy Objectives.* The purpose of this *Report and Order* is to establish a new framework to facilitate competitive entry in the U.S. satellite services market by foreign-licensed satellites to implement the WTO Basic Telecom Agreement. Providing opportunities for foreign-licensed satellites to deliver services in this country should bring U.S. consumers the benefits of enhanced competition and afford greater opportunities for U.S. companies to enter previously closed foreign markets, thereby stimulating a more competitive global satellite services market.

11. *WTO Members.* We adopt an open entry standard for applicants seeking to access satellite systems licensed by WTO Members to provide satellite services covered by the U.S. commitments under the WTO Basic Telecom Agreement. An open entry policy will enable U.S. consumers to enjoy the benefits of increased competition in U.S. markets. We presume that entry will enhance competition in light of the commitments of so many WTO Members to lift entry restrictions and adopt competitive safeguards. Where necessary to constrain the potential for anticompetitive harm in the U.S. market for satellite services, we reserve the right to attach conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.

12. *Non-WTO Members.* We continue to be concerned about effective competitive opportunities for U.S. satellite systems (ECO-Sat) in non-WTO Member markets. We find that the market conditions that existed when the Commission proposed to adopt an ECO-Sat test have not changed sufficiently with respect to countries that are not members of the WTO. We therefore find that it will serve the goals of our international satellite policy to apply the ECO-Sat test in the context of applications from non-WTO Member entities and encourage such countries to open their markets to competition.

13. *Services Not Covered by the U.S. Commitments Under the WTO Basic Telecom Agreement.* We find that circumstances that existed when the Commission proposed to adopt

an ECO-Sat test have not changed sufficiently with respect to Direct-to-Home (DTH) services, Direct Broadcast Satellite (DBS) services, and Digital Audio Radio Services (DARS). Commitments made as part of the WTO Basic Telecom Agreement were not sufficient to enable us to adopt a presumption of entry for these services. We will apply the ECO-Sat test to applications to provide these services through all foreign satellite systems, whether or not they are systems of WTO Members.

14. *Intergovernmental Satellite Organizations (IGOs) and IGO Affiliates.* Prior to acting on any application from COMSAT to provide domestic service via INTELSAT or Inmarsat, we will require COMSAT to make an appropriate waiver of its immunity from suit, including suit under the U.S. antitrust laws. We will then look to COMSAT to show that entry into the domestic market would promote competition and would otherwise be in the public interest. We will treat IGO affiliates that are licensed by WTO Members as we would similar systems licensed by WTO Members. In evaluating the competition component of an application involving an IGO affiliate, we will consider any potential anticompetitive or market distorting consequences of a continued relationship or connection between an IGO and its affiliate.

15. *Additional Public Interest Factors and Operating Requirements.* In evaluating requests to serve the United States using a non-U.S. satellite, we also will consider additional public interest factors, including spectrum availability, eligibility requirements such as legal, technical and financial qualifications, operating requirements, and national security, law enforcement, foreign policy and trade policy concerns, as appropriate. In applying these factors, we will treat non-U.S. satellites and U.S. satellites alike. Thus, non-U.S. systems will be required to comply with the same financial, technical and legal qualifications, observe the prohibition against exclusive service arrangements, and comply with other general service rules applicable to U.S. systems.

16. *Access Procedures.* In implementing this framework, we will not require space stations licensed by another country or administration to obtain separate and duplicative U.S. space station licenses. Rather, we will license earth stations located in the United States to operate with these satellites. Further, we will permit operators of existing or planned non-U.S. space stations to participate in U.S. space station processing rounds, where we consider competing applications to operate space stations that will offer a specific satellite service in particular frequency bands. In addition, earth station entities may file an earth station application either in a processing round or separately where the non-U.S. satellite is already in orbit.

II. BACKGROUND

A. *Notice of Proposed Rulemaking*

17. As explained above, in the *Notice*[8] that commenced this proceeding, the Commission proposed a public interest framework for permitting non-U.S. satellite systems to serve the United States. Specifically, the Commission proposed to evaluate applications involving non-U.S. satellites by determining whether U.S. satellite operators have effective competitive opportunities in the satellite service market of the foreign licensing or coordinating administration. The Commission also proposed to consider whether such opportunities exist on the route markets that the applicant seeks to serve from earth stations in the United States.[9] In making this evaluation, the Commission proposed to examine both *de jure* and *de facto* constraints on entry in the foreign market by U.S. satellite operators.[10] The *Notice* also proposed alternative regulatory approaches for considering whether to permit access to the U.S. domestic market by INTELSAT and Inmarsat or any IGO affiliate.[11]

18. The *Notice* also asked whether the ECO-Sat test was adaptable to all satellite services.[12] The Commission recognized that, with certain global communications systems, such as mobile satellite systems, landline facilities may be used in the United States, instead of satellite links. For example, a call originating in an office in the United States to a mobile-satellite service (MSS) handset in Asia could travel to Asia by landline before any satellite communication occurs. In that case, there would not be an earth station application or other vehicle to trigger an ECO-Sat analysis. Consequently, the Commission proposed to analyze effective competitive opportunities in the MSS market by measuring whether some critical mass of foreign markets is open to U.S.-licensed MSS systems before we would permit a non-U.S. MSS system to provide *any* service in the United States.[13] Finally, the Commission proposed to consider any other public interest concerns relevant to the decision to permit access by non-U.S. systems, including spectrum availability, legal and operating

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[8] *Notice*, 11 FCC Rcd 18178.

[9] *See Notice* at ¶¶ 22-32.

[10] *Id.* at ¶¶ 37-42.

[11] *Id.* at ¶¶ 62-74.

[12] *Id.* at ¶¶ 44-47.

[13] *Id.* at ¶ 47.

requirements, and, with guidance from the Executive Branch when appropriate, issues of national security, law enforcement, foreign policy, and trade policy.[14]

B. The WTO Basic Telecom Agreement

19. The WTO Basic Telecom Agreement was completed after issuance of the *Notice*. It was concluded under the framework established by the General Agreement on Trade in Service (GATS), which is one of the agreements negotiated in conjunction with the creation of the WTO.[15] Under the WTO Basic Telecom Agreement, 69 WTO Members, including the United States, committed to provide each other market access in some or all of their basic telecommunications sectors. Forty-nine WTO Members, including the United States, committed to open their markets to foreign competition in satellite services, either on January 1, 1998, or on a phased-in basis.

20. The GATS is composed of three major components. The first component is the general obligations and disciplines that apply to all WTO Members. The second component is the specific commitments relating to market access, national treatment and other commitments that are identified in individual WTO Member Schedules of Specific Commitments.[16] The final component is exemptions from the general obligations that are contained in Lists of Article II (Most-Favored-Nation (MFN)) Exemptions.

21. Because all WTO Members are party to the GATS, they are obligated to comply with the GATS' general obligations regardless of whether they participated in the WTO basic telecommunications services negotiations or made market access commitments. Under Article II of the GATS, all WTO Members must provide MFN treatment to like services and service suppliers of all other WTO Members. In addition to the MFN obligation, all WTO Members must comply with the transparency obligations of Article III of the GATS, which requires prompt publication of all laws and regulations applicable to the provision of services.

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[14] *Id.* at ¶ 48. We received 34 comments and 34 reply comments in response to the *Notice*. A list of commenters on the *Notice*, as well as a description of the abbreviations used in this *Report and Order*, is contained in Appendix A.

[15] The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the Marrakesh Agreement). 33 I.L.M. 1125 (1994). The Marrakesh Agreement includes multilateral agreements on trade in goods, services, intellectual property, and dispute settlement. The General Agreement on Trade in Services (GATS) is Annex 1B of the Marrakesh Agreement. 33 I.L.M. 1167 (1994). There are currently about 130 members of the WTO. A fuller description of the WTO Basic Telecom Agreement is included in Sections II.B. and VII. of the *Foreign Participation Order*.

[16] The Schedules of Specific Commitments form an integral part of the GATS pursuant to Article XX of the GATS. The Schedules containing commitments in the basic telecommunications sector are available on the WTO web page at www.wto.org.

22. In the WTO Basic Telecom Agreement, many WTO Members, including the United States, undertook specific commitments with respect to market access and national treatment. GATS Article XVI (Market Access) requires WTO Members to refrain from imposing certain types of quantitative restrictions, economic needs test, or local incorporation requirements, in those sectors where the WTO Member has undertaken specific commitments.[17] This means that a WTO Member may not maintain limits, such as a cap on the number of service suppliers or the corporate form in which a service can be provided, unless the WTO Member has specifically listed such limitations in its Schedule. Article XVII (National Treatment)[18] is a nondiscrimination rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and service suppliers.[19] Treatment of domestic and foreign service suppliers need not be identical to accord MFN or national treatment. Rather, the critical aspect of an MFN or national treatment analysis is whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers.[20] Thus, even identical treatment can be inconsistent with MFN or national treatment obligations if it puts the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier.

23. Those WTO Members that undertook market access commitments in basic telecommunications services also become subject to the requirements relating to domestic regulation of those services contained in Article VI (Domestic Regulation). Pursuant to Article VI(1), in sectors where specific commitments are undertaken, domestic regulation must be administered in a reasonable, objective, and impartial manner. Article VI(4) states further that a WTO Member could be in contravention of its commitments if it applies measures that are not based on objective and transparent criteria, are more burdensome than necessary, or that restrict the supply of the service. A WTO Member arguing, however, that

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[17] Article XVI(1) requires each Member to "accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." A quantitative restriction is a cap on the number of permitted suppliers; an economic needs test is a limitation on the number of service suppliers based on an assessment of whether the market will be able to absorb new service suppliers without harm to existing service suppliers.

[18] Art. XVII states that "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."

[19] *See* Reply Comments of the U.S. Trade Representative (USTR) filed in the *Foreign Participation Order* rulemaking (USTR *Foreign Participation* Reply Comments). We grant USTR's request to incorporate these comments in this proceeding. USTR FNPRM Reply Comments at 6.

[20] *See* USTR *Foreign Participation* Reply Comments at 11, n.16.

a measure contravenes Article VI(4) also must show that application of the measures could not have been reasonably expected at the time specific commitments were made.[21]

24. Finally, the United States and 54 other countries undertook additional specific commitments regarding procompetitive regulatory principles contained in the "Reference Paper."[22] The Reference Paper contains principles relating to competition safeguards, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce frequencies.[23]

25. The United States committed to provide market access to all basic telecommunications services and national treatment to service suppliers of WTO Members. The United States maintained limits on direct access to INTELSAT and Inmarsat for COMSAT for the provision of basic telecommunications services. The United States also maintained a limit of 20 percent on direct foreign ownership of common carrier radio licenses,[24] but agreed to permit 100 percent indirect foreign ownership. In addition, the United States made no market access or national treatment commitments for DTH, DBS, and DARS, and took an exception from MFN for those services.[25]

26. The GATS also allows for exceptions to a WTO Member's obligations. Where these exceptions apply, a WTO Member may act inconsistently with its MFN, national treatment or market access commitments or any other GATS obligation. Article XIV (General Exceptions) establishes a limited set of general exceptions, for measures necessary to protect public morals and order, protect human and animal health or secure compliance with nondiscriminatory laws and regulations.[26] Article XIV *bis* (Security Exceptions) permits a

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[21] Article VI(5)(a) states that a Member "shall not apply licensing and qualification requirements and technical standards that nullify or impair [its] specific commitments in a manner which . . . could not reasonably have been expected of that Member at the time the specific commitments were made." *See also* USTR *Foreign Participation* Comments at 9.

[22] In addition, ten WTO Members committed to honoring many of the principles in the Reference Paper. The Reference Paper was distributed by the WTO Secretariat but never formally issued as a WTO document. The text is published in 36 I.L.M. 367 (1997).

[23] Many of these principles already are applied in the United States under the Communications Act, the Telecommunications Act of 1996, and the Administrative Procedure Act.

[24] The limitation is based on the statutory prohibition in Section 310(b)(3) of the Communications Act, which prohibits direct foreign ownership beyond 20 percent. *See* 47 U.S.C. § 310(b)(3).

[25] These services are referred to in this order as "non-covered services."

[26] Article XIV states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement... ."

WTO Member to deviate from its GATS obligations in order to protect national security interests or to carry out any obligations under the U.N. Charter to maintain international peace and security.[27]

27. The commitments of the WTO Basic Telecom Agreement can be enforced through WTO dispute settlement.[28] If a WTO Member fails to give a U.S. carrier market access consistent with that WTO Member's commitments or fails to implement the regulatory principles it adopted, the United States may enforce those commitments through the dispute settlement process at the WTO. The remedies available if the United States prevails include first an obligation by the losing WTO Member to fulfill its market access commitments or implement the necessary regulatory principles. If the losing WTO Member fails to do so, it is required to compensate the United States in trade terms or else the United States may take compensatory trade action. The United States would be required initially to withdraw concessions in the services sector, but if sufficient compensatory trade action is not available in the services sector, then the United States would be authorized to take compensatory action in the goods sector. Thus, if a WTO Member that has committed to allow market access to provide satellite services but denies a license to a U.S. provider on the grounds of its nationality, the United States would have the right to take a dispute against that WTO Member in the WTO. While companies from the defendant WTO Member might not be interested in entering the U.S. telecommunications market, its industry likely would have substantial volumes of trade with the United States in a variety of other goods and services sectors. Thus, if the United States prevails in a dispute, the losing WTO Member would most likely agree to fulfill its market access or regulatory principles commitments rather than accept compensatory trade action in other services or goods sectors.

C. *Further Notice of Proposed Rulemaking*

28. After conclusion of the WTO Basic Telecom Agreement, we issued a *Further Notice of Proposed Rulemaking* requesting comment on how best to open U.S. markets consistent with our commitments under the new agreement and our goal of promoting a competitive satellite market in the United States.[29] We sought comment on whether, and to what extent, the proposals in the *Notice* should be changed both with respect to countries and

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[27] Article XIV *bis* states that "[n]othing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests . . . or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

[28] GATS Article XXII provides that any WTO Member may initiate dispute settlement if it believes that another Member has failed to carry out its obligations or specific commitments.

[29] *See supra* n.4. We received 27 comments and 17 reply comments in response to the *Further Notice*. A list of commenters, as well as a description of the abbreviations used in this *Report and Order*, is attached as Appendix B.

services covered by the WTO Basic Telecom Agreement and those that are not. We proposed to establish a presumption that as a result of the agreement and the obligations of the GATS, competition will be promoted, and therefore, no ECO-Sat analysis is required, in evaluating whether to permit satellites licensed by WTO Members to provide covered services within the United States and between the United States and other WTO Members.[30] We also proposed to allow opposing parties to show that grant of a license would pose a very high risk to competition in the U.S. satellite market that could not be cured by license conditions. We proposed to retain the ECO-Sat test for satellites licensed by non-WTO countries[31] and noncovered services (DTH, DBS, and DARS).[32] With respect to IGOs and their affiliates and consideration of other public interest factors, the *Further Notice* repeated proposals contained in the *Notice*.

III. DISCUSSION

A. General Framework

29. As proposed in the *Notice* and *Further Notice*, in order to be approved, each request for access to the United States by a non-U.S. satellite system must be in the public interest. A public interest analysis is required by the Communications Act, is a valid exercise of U.S. domestic regulatory authority, and, as discussed more fully below, is consistent with U.S. obligations under the GATS.[33] Where a non-U.S. satellite licensed by a WTO Member and a WTO-covered satellite service are involved, we will presume that foreign entry would promote competition in the United States. In cases involving satellites licensed by non-WTO countries or noncovered services, we will apply an ECO-Sat test. For every request, we also will consider spectrum availability, eligibility requirements and operating requirements, and national security, law enforcement, foreign policy, and trade issues.

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[30] *Further Notice* at ¶¶ 16-19.

[31] *Id.* at ¶¶ 23-24.

[32] *Id.* at ¶¶ 20-22.

[33] *See infra* Section III.E.

B. Public Interest Analysis

1. Competition Considerations

a. WTO-Member Satellites Providing WTO-Covered Services

(1) Presumption in Favor of Entry

Background

30. The United States satellite commitments under the WTO Basic Telecom Agreement cover fixed satellite services (FSS) and mobile satellite services (MSS) (WTO-covered services). In the *Further Notice*, the Commission proposed that, in evaluating requests to access non-U.S. satellites licensed by WTO Members to provide WTO-covered services within the United States or between the United States and other WTO Members, we would apply a presumption in favor of entry.[34] The Commission based this proposal on its view that the general obligations of all WTO Members under the GATS, as well as the satellite market access commitments of 49 countries under the WTO Basic Telecom Agreement, would enhance competition in the U.S. satellite services market.[35] Specifically, the Commission proposed not to apply the ECO-Sat test, which had been proposed prior to the WTO Basic Telecom Agreement, to satellites licensed by WTO Members providing covered services.[36]

31. The Commission also proposed to forego the ECO-Sat test for all WTO Members, including those that did not make specific commitments for satellite services. The Commission proposed this because these WTO Members are bound to extend MFN treatment to services or service suppliers of other WTO Members, unless a specific limitation has been taken, and are subject to the dispute resolution process contained in the GATS.[37]

32. In addition, in the *Further Notice*, the Commission proposed to permit parties opposing an application to serve the United States from a non-U.S. satellite system licensed

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[34] *Further Notice* at ¶¶ 2, 13, 18.

[35] *Id.* at ¶¶ 2, 17.

[36] *Id.* at ¶¶ 2, 13. As discussed above, *see supra* Section II.A., the Commission initially proposed the ECO-Sat test in the *Notice*, 11 FCC Rcd 18178, 18187-18194. Because the Commission subsequently proposed to forego the ECO-Sat test for satellites licensed by WTO Members, and rather proposed to apply a presumption in favor of entry, which the Commission now adopts, the comments on the *Notice* regarding the ECO-Sat test are not applicable to this section of the *Report and Order*. Comments on the ECO-Sat test are applicable, however, to our discussion of non-WTO countries and services not covered by U.S. commitments in the WTO Basic Telecom Agreement. *See infra* Section III.B.1.b. and c.

[37] *Id.* at ¶ 17.

by a WTO Member to demonstrate that grant would pose a "very high risk to competition in the United States satellite market that could not be addressed by placing a condition on the authorization," in order to rebut the presumption of competitive entry.[38] The Commission stated that if the opposing party meets this burden, it may deny access to the United States,[39] and noted that, independent of any comments, it could make its own such determination.[40]

33. The Commission also sought comment on the types of license conditions it could impose to minimize the likelihood of anticompetitive behavior.[41] The Commission noted, for example, that for systems to which access already has been authorized, it could condition authorization of additional earth stations on the absence of factors that we have identified as being anticompetitive in that particular case. Alternatively, the Commission could impose stricter reporting requirements in authorizing systems for which there is a greater likelihood of competitive harm. Finally, the Commission requested that commenters address specific benefits or disadvantages of these or any other proposals for minimizing anticompetitive behavior in accessing non-U.S. satellite systems, focusing particularly on the principles delineated in the Reference Paper.[42]

Positions of the Parties

34. The parties overwhelmingly support our proposal to forego the ECO-Sat test for satellites licensed by WTO Members for covered services and evaluate requests based on a presumption in favor of entry.[43] Numerous commenters, including Deutsche Telekom, GE Americom, COMSAT, AirTouch, the Networks, ICO (an affiliate of Inmarsat), and Motorola support the Commission's view that the WTO Basic Telecom Agreement will enhance

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[38] *Id.* at ¶¶ 13, 18, 19.

[39] *Id.*

[40] *Id.* at ¶ 13.

[41] *Id.* at ¶ 19.

[42] *Id.*

[43] AirTouch FNPRM Comments at 2; Columbia FNPRM Comments at 4; COMSAT FNPRM Comments at 5-9; COMSAT FNPRM Reply Comments at 2-5; Deutsche Telekom FNPRM Reply Comments at 2; European Commission FNPRM Reply Comments at 1; GE Americom FNPRM Comments at 3-4; GlobeCast FNPRM Comments at 2-3; Government of Japan FNPRM Comments at 1; Hughes FNPRM Comments at 6-10; Hughes FNPRM Reply Comments at 3-4; ICO FNPRM Comments at 4-7; ICO FNPRM Reply Comments at 1-5; Lockheed Martin FNPRM Comments at 2-3; Loral FNPRM Comments at 3; Motorola FNPRM Comments at 3-4; Orion FNPRM Comments at 3-8; PanAmSat FNPRM Comments at 2; PanAmSat FNPRM Reply Comments at 1; Qualcomm FNPRM Comments at 2-3; Skybridge FNPRM Comments at 3; Space Communications FNPRM Reply Comments at 4; Teledesic FNPRM Comments at 3-4; Telesat FNPRM Comments at 4-5; TMI FNPRM Comments at 2; USTR FNPRM Reply Comments at 5.

competition in the satellite services market.[44] Deutsche Telekom, ICO, and Hughes argue that application of an ECO-Sat test to WTO Members would violate the national treatment and MFN obligations of the WTO Basic Telecom Agreement.[45]

35. Qualcomm asserts that we should apply the presumption in favor of entry to all WTO Members, including those that did not make market access commitments for satellite services. It contends that the general competitive obligations of the GATS are sufficient to presume that service in the United States by such WTO Members will foster competition.[46] Hughes asserts that in negotiating the WTO Basic Telecom Agreement, the Executive Branch was aware that the commitments of WTO Members would vary, but concluded that the Agreement would create significant overall benefits for U.S. satellite service providers and that the U.S. policy should be to promote competition from foreign-licensed satellites.[47]

36. Some commenters argue that applicants should bear the burden of demonstrating that their entry will pose no risk to competition.[48] AMSC, for example, asserts that the proposed presumption for satellite systems from WTO Members is not required by the WTO Basic Telecom Agreement and is contrary to the burden the Commission normally establishes on applicants to demonstrate compliance with the Communications Act. According to AMSC, there should be a "heavy burden on the proponent to establish grounds for such a reversal of Commission policy."[49] Loral argues in fact that this standard effectively treats non-U.S. satellites more favorably than U.S. applicants.[50]

37. Most commenters support the Commission's proposal to allow opposing parties to rebut the presumption that entry by a non-U.S. satellite would promote competition only by

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[44] Deutsche Telekom FNPRM Reply Comments at 3. GE Americom FNPRM Comments at 2. GE Americom also states that "achievement of the agreement was facilitated by the Commission's emphasis on creating competitive market structures in the United States and on encouraging the adoption of similar policies in other countries." *Id. Accord* Hughes FNPRM Reply Comments at 2. COMSAT FNPRM Comments at 3; AirTouch FNPRM Comments at 1-2; Networks FNPRM Comments at 5; ICO FNPRM Reply Comments at 3; ICO FNPRM Comments at 2-3; Motorola FNPRM Comments at 2.

[45] Hughes FNPRM Comments at 7-8; Deutsche Telekom FNPRM Reply Comments at 3. According to Hughes, for example, examining the openness of various markets to U.S.-licensed satellites could result in differential treatment among WTO Members, thereby violating the MFN obligation. Hughes FNPRM Comments at 8.

[46] Qualcomm FNPRM Comments at 3.

[47] Hughes FNPRM Comments at 8.

[48] Loral FNPRM Comments at 22-23 and n.42 (citing 47 U.S.C. §§ 303, 308(b), 309(a)).

[49] AMSC FNPRM Reply Comments at 12.

[50] Loral FNPRM Comments at 23.

demonstrating that service to the United States by a satellite licensed by a WTO Member would create a very high risk of competitive harm that could not be cured by license conditions.[51] Orion anticipates that most applications for WTO-covered services between the United States and a WTO Member destination will present "little, if any, such risk."[52] PanAmSat argues that the burden must "necessarily be high," and, if met, the Commission "*must*," rather than "may," deny the request.[53] AT&T asserts that the "very high risk to competition" standard should instead be "*substantial risk*" to competition.[54] COMSAT contends that denying or delaying access to the U.S. market, or imposing unreasonable or unnecessary safeguards, not only would violate national treatment, but likely would lead other countries to impose similar obstacles for U.S.-licensed systems, thus jeopardizing the benefits of the WTO Basic Telecom Agreement.[55] Space Communications advocates that we require that risks to competition be "highly likely to have a broad-based impact in the relevant market."[56] It cites, for example: market concentration, discrimination, below average variable cost pricing, exclusionary effects of exclusive arrangements and monopoly supply of service.[57] ICO recommends denial of applications involving non-U.S. satellites only "where the applicant has market power and will use that power to raise prices and limit output in the U.S. satellite market."[58]

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[51] COMSAT FNPRM Comments at 7; COMSAT FNPRM Reply Comments at 2; GE Americom FNPRM Comments at 3; GE Americom FNPRM Reply Comments at 2-3; Hughes FNPRM Reply Comments at 4; Lockheed Martin FNPRM Comments at 4; Orion FNPRM Comments at 4-5; Qualcomm FNPRM Comments at 3-4; Skybridge FNPRM Comments at 4 n.4; Space Communications FNPRM Reply Comments at 3.

[52] Orion FNPRM Comments at 5.

[53] PanAmSat FNPRM Comments at 3.

[54] AT&T FNPRM Comments at 13.

[55] COMSAT FNPRM Comments at 7; COMSAT FNPRM Reply Comments at 5-7.

[56] Space Communications FNPRM Reply Comments at 5.

[57] In addition, Space Communications asserts that opponents should be required to provide specific evidence of such risks, based on the six principles set forth in the Reference Paper or the WTO commitments of the home market, as well as explain why conditions on the authorization would be inadequate to protect competition. *Id.* at 6. According to Space Communications, practices such as discount pricing that do not meet the legal standard required by statutes for a finding of predatory pricing -- practices that could be considered aggressively competitive, but not illegal restraints under U.S. antitrust law -- should *not* be treated as a "very high risk" to competition. *Id.* at 5.

[58] ICO FNPRM Comments at 8-9. ICO supports the proposal to the extent that it confirms the Commission's continuing, concurrent jurisdiction to enforce U.S. antitrust laws. *Id.* at 7. It also asserts that U.S. antitrust laws assume that an increase in the number of competitors will increase consumer welfare, and any abusive conduct by a new entrant would be addressed through post-entry enforcement. ICO claims further that antitrust laws prohibit entry only where entry itself will reduce competition, limit output, and raise prices. *Id.* at 7-9 & n.12. In addition, ICO claims that trade disputes should not bar entry. *Id.* at 9.

38. USTR states that the GATS does not prohibit the regulatory standard we adopt.[59] Other parties, however, challenge the proposal based on alleged inconsistencies with the GATS and some offer recommendations for implementing the standard consistent with the GATS.[60] A few commenters raise MFN and national treatment objections.[61] The European Commission, the Government of Japan, and Japan Satellite Systems argue that the proposed competitive harm standard is too vague.[62] The European Commission claims that if adopted, the proposal would erect additional burdens for foreign companies wishing to enter the U.S. satellite market. The Government of Japan requests that we make publicly available the detailed criteria that we would employ and apply our rules consistent with the GATS.[63] France Telecom contends that Commission action under the guise of competition could contradict market access commitments.[64] Deutsche Telekom claims that the proposed presumption is vague and incompatible with the GATS because the U.S. Schedule of Specific Commitments does not contain a rebuttable presumption for market access where there is a "very high risk to competition."[65] GlobeCast contends that the proposal creates a "loop-hole for the Commission to abrogate the WTO Basic Telecom Agreement at its sole discretion.

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[59] USTR FNPRM Reply Comments at 5.

[60] *See, e.g.*, Deutsche Telekom FNPRM Reply Comments at 6-7; France Telecom FNPRM Reply Comments at 5; GlobeCast FNPRM Comments at 3; Government of Japan FNPRM Comments at 2.

[61] *See* Deutsche Telekom FNPRM Reply Comments at 6-7; COMSAT FNPRM Comments at 7. Deutsche Telekom states that under MFN obligations the Commission may not grant market access to a satellite system from one WTO Member and deny it to a "like" system from another Member, and that the competitive situation in a satellite system's home or route markets is not a factor that makes satellite systems alike (or not) under the GATS. In addition, Deutsche Telekom argues that because U.S. systems would not be subject to the "very high risk to competition" rule, non-U.S. applicants would be treated less favorably than U.S. operators in violation of the GATS. Deutsche Telekom FNPRM Reply Comments at 6-7.

[62] European Commission FNPRM Reply Comments at 2; Government of Japan FNPRM Comments at 2; Japan Sat FNPRM Comments at 2. *See also* Deutsche Telekom FNPRM Reply Comments at 5; France Telecom FNPRM Reply Comments at 5; Space Communications FNPRM Comments at 5 (criticizing vagueness of proposal). For example, according to Deutsche Telekom, given the similarity between the burden standard and the ECO-Sat test, it is possible that the Commission will consider elements of the ECO-Sat while assessing applications by WTO Members. Deutsche Telekom FNPRM Reply Comments at 5. Deutsche Telekom also argues that the uncertainty of the "very high risk to competition" rule would have a "significant impact" on a satellite operator's financing and planning, which would be problematic because of the high financial investments required for satellites. *Id.*

[63] Government of Japan FNPRM Comments at 2.

[64] France Telecom FNPRM Reply Comments at 4-5.

[65] Deutsche Telekom FNPRM Reply Comments at 7. *See also* European Commission FNPRM Reply Comments at 2.

whenever it decides that a non-U.S. licensed satellite is a competitive threat."[66] ICO argues that the GATS requires WTO Members to use the WTO dispute settlement mechanism, rather than exclusion from domestic markets, as a means of resolving claims that the markets of other WTO Members are not sufficiently open to competition. In addition, it states that the Commission may not take the level of a Member's commitments into account in the absence of a specific reservation to that effect.[67]

Discussion

39. We adopt our proposal to apply a presumption in favor of entry in considering applications to access non-U.S. satellites licensed by WTO Members to provide services covered by the U.S. commitments under the WTO Basic Telecom Agreement. Specifically, we will presume that satellite systems licensed by WTO Members providing WTO-covered services satisfy the competition component of the public interest analysis. As discussed in the *Further Notice*,[68] and supported by the parties to this proceeding,[69] market access commitments made by WTO Members under the WTO Basic Telecom Agreement and the procompetitive obligations of the GATS and the Reference Paper, will help ensure the presence and advancement of competition in the satellite services market and yield the benefits of a competitive marketplace to consumers in the United States and other countries. These benefits include greater availability of satellite services from a larger number of providers, more efficient and innovative services, lower prices, higher quality, and, overall, more choices for users and consumers in the selection of satellite services.[70] Thus, these benefits will further the Commission's goal of promoting a competitive satellite services market in the United States.[71]

40. We find that adopting the Commission's proposal to replace the ECO-Sat test with a presumption in favor of entry will best balance the concerns articulated by the parties. The changes resulting from implementation of the commitments of WTO Members, along with new, more global satellite system designs, will open foreign markets and increase competition in the worldwide satellite services market. We therefore will not conduct an ECO-Sat test with respect to non-U.S. satellite systems licensed by WTO Members and, instead, will presume that entry will promote competition. This approach will have

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[66] GlobeCast FNPRM Comments at 3.

[67] ICO Reply Comments at 5, 7.

[68] *See supra* ¶ 27; *see also Further Notice* at ¶¶ 13-19.

[69] *See supra* ¶ 36.

[70] *Further Notice* at ¶ 16.

[71] *Id.* at ¶ 13.

significant public interest benefits. First, it will facilitate entry by the 130 Members of the WTO, including our major trading partners. Second, it will avoid detailed, fact-intensive ECO-Sat analyses by the applicant and the Commission, thereby expediting the entry process. The opportunity to serve the U.S. market under a presumption in favor of entry, coupled with the procedural ease of the framework we adopt today, will advance entry of new competitors and services into the U.S. satellite services market. By enhancing competition, this approach will provide U.S. consumers with additional choices among providers, reduce prices, and increase the quality and variety of services.

41. We also adopt the proposal to allow parties to rebut the presumption of entry by showing that grant of an application by a non-U.S. satellite system licensed by a WTO Member would cause competitive harm in the United States satellite market. In most cases, our rule prohibiting exclusive arrangements will adequately address competition concerns.[72] It is possible, however, that this prohibition would be insufficient to prevent anticompetitive harm in the United States. Where necessary to constrain the potential for anticompetitive harm in the U.S. market for satellite services, we reserve the right to attach additional conditions to a grant of authority, or, in the exceptional case in which grant would pose a very high risk to competition, to deny an application. Prospective circumstances that could give rise to competition concerns include some of those identified by the parties: market concentration, discrimination, below average variable cost pricing, monopoly supply of service, as Space Communications states, or where the applicant has market power and could use that power to raise prices and limit output in the U.S. satellite market, as ICO suggests. Based on the development of the satellite market thus far, it has not been necessary to devise or impose competitive safeguards other than the rule against exclusive arrangements. Should such a need arise, the Commission would devise and apply appropriate conditions.

42. We also are concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's rules and, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of an earth station applicant or space station operator that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct. This approach is consistent with our

[72] This rule prohibits licensees from entering arrangements with foreign countries to be the exclusive provider of a particular satellite service in that country. *See, e.g.*, 47 CFR § 25.143(j). As described below, all satellite systems serving the United States, including any non-U.S. licensed system, will be prohibited from serving from the United States on a route involving a country with which it has an exclusive arrangement. *See infra* Section III.B.4.a.

treatment of U.S. applicants.[73] We find that such conduct demonstrates that an entity is likely to evade our rules and thus may pose a very high risk to competition.

43. We expect that, given the procompetitive changes in the global satellite services market resulting from the WTO Basic Telecom Agreement, and our ability to impose license conditions, it would be necessary to deny an application involving a non-U.S. satellite licensed by a WTO Member on competition grounds only in exceptional circumstances. This approach is consistent with our statutory requirement to grant licenses that serve the public interest, as well as with our obligations under the WTO Basic Telecom Agreement.

44. As proposed, we will apply the rebuttable presumption paradigm to a satellite system licensed by any WTO Member, including Members that did not make specific market access commitments for satellite services. We do so for three reasons. First, we find that the general obligations of the GATS provide some protection against discriminatory conduct. As described above, all WTO Members are governed by the GATS and must comply with the GATS obligations of MFN and transparency. Consequently, a WTO Member that did not make a market access commitment for satellite services must nonetheless afford no less favorable treatment to a U.S. satellite system than it does to a system licensed in any other country if the WTO Member decides to open its market. In addition, all WTO Members must make public all their measures relating to services. Second, the increased competitive environment for global satellite and telecommunications services resulting from the WTO Basic Telecom Agreement, coupled with the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market. Third, we find that to exclude WTO Members that did not make market access commitments, or distinguish among those based on the quality of their WTO commitment or the extent of the implementation of their commitment, could be interpreted by other WTO Members as discriminating among "like" service suppliers, and could therefore raise an MFN issue. Thus, adopting such a policy could negatively affect relations with our trading partners or discourage open entry policies in countries that also are implementing the WTO Basic Telecom Agreement. The success of the WTO Basic Telecom Agreement depends on prompt, effective implementation of U.S. commitments, as well as those of our trading partners.

45. We disagree with AT&T that the test should be "substantial risk," rather than "very high risk" to competition.[74] AT&T's standard would undercut the presumption in favor of entry by making it easier to oppose entry. As explained above, the commitments and obligations of countries bound by the GATS and the WTO Basic Telecom Agreement will

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[73] *See Policy Regarding Character Qualification in Broadcasting Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252 (1990); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n. 14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

[74] AT&T FNPRM Comments at 13.

generally enhance competition in the United States satellite services market. If adopted, AT&T's suggestion would undermine the commitments made under the WTO Basic Telecom Agreement and the good faith efforts of the WTO Members to implement their commitments. As noted, we expect that only in exceptional cases will we deny applications based on competition grounds.

46. We find unpersuasive the European Commission's position that the Commission may not review or deny applications in order to protect competition in the U.S. market. The GATS does not specify a single mechanism for addressing potential anticompetitive practices in the telecom services sector. The United States has traditionally relied on regulatory enforcement and antitrust actions, and remains free to do so. Analyzing competitive impact is an integral part of the Commission's public interest analysis. The Communications Act charges the Commission with "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ... ."[75] In carrying out that charge for over 60 years, the Commission has sought to promote competition in the U.S. market.[76] Indeed, we have consistently considered competition issues when authorizing U.S. satellite companies to serve the United States.[77] When the United States entered into the WTO Basic Telecom Agreement, it did so with the understanding that its obligations would be carried out consistent with U.S. law.[78]

47. We also do not agree with those parties that argue that the standard under which we could deny an application involving a non-U.S. WTO-licensed satellite is vague, erects additional barriers for foreign entities, or violates our national treatment obligations. First, we have provided guidance in the discussion above regarding application of the standard. Second, we expect denial of such applications for competitive reasons to occur only

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[75] 47 U.S.C. § 151.

[76] *See, e.g., Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252 , First Report & Order, 85 FCC 2d 1 (1980); Second Report & Order, 91 FCC 2d 59 (1982); *recon.* 93 FCC 2d 54 (1983); Third Report & Order, 48 Fed. Reg. 46,791 (1983); Fourth Report & Order, 95 FCC 2d 554 (1983), *vacated, AT&T v. FCC*, 978 F.2d 727 (1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 113 S.Ct. 3020 (1993); Fifth Report & Order, 98 FCC 2d 1191 (1984); Sixth Report & Order, 99 FCC 2d 1020 (1985), *rev'd, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[77] *See, e.g., Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995). *See also Hughes Communications, Inc. and Affiliated Companies and Anselmo Voting Trust/PanAmSat Licensee Corporation and Affiliated Companies*, 12 FCC Rcd 7534 (1996).

[78] The final offer in the WTO basic telecom negotiations included a cover note which stated that "foreign investors will receive national treatment in accordance with U.S. law." Communications from the United States, "Conditional Offer" (Feb. 12, 1997).

in exceptional circumstances. Third, because we also consider competition factors in evaluating entry by U.S. companies, this approach does not treat U.S.-licensed satellite systems more favorably than foreign systems. Similarly, the standard of entry does not discriminate impermissibly among foreign providers in a manner inconsistent with our MFN obligations, as Deutsche Telekom argues. Whether a measure accords less favorable treatment within the meaning of GATS Article II (MFN) must be decided on a case-by-case basis by considering whether the services or service suppliers are like, and then analyzing the structure and application of the measures.[79] The analysis focuses not on whether the treatment of like foreign or like domestic suppliers is identical, but rather whether the treatment modifies the conditions of competition in favor of foreign service suppliers of a particular origin or domestic service suppliers. In this case, we are not discriminating among like service suppliers. Rather, we are treating all carriers that have the ability to distort competition similarly, while treating carriers that do not have that ability similarly.

48. In addition, we are not persuaded by Deutsche Telekom's and ICO's argument that we may not consider competition because we have not scheduled such consideration in the U.S. Schedule of Specific Commitments. We note USTR's comment that the negotiating history of the GATS shows that, rather than prohibiting all domestic regulation of basic telecommunications services, Article XVI only prohibits WTO Members from maintaining or adopting the types of quantitative or economic-needs based limitations and measures listed in Article XVI (unless such limitations are included in a WTO Member's Schedule of Specific Commitments).[80] The standard of review we adopt is not the type of limitation prohibited by Article XVI. Therefore, there is no need for the United States to have included the competition analysis as a limitation on its market access commitments in its Schedule of Specific Commitments.[81]

49. We do not accept the notion that we should depend on other countries' implementation of their commitments and the WTO dispute mechanism in lieu of applying competition factors in our regulatory process. There is nothing in the GATS that requires us to refrain from regulating because other WTO Members have an obligation to regulate. Access to WTO dispute settlement does not eliminate the need for and the appropriateness of our regulation of telecommunications services in order to safeguard competitive opportunities.[82] WTO dispute settlement is an effective remedy, but one that takes some time to obtain. In addition, it is not a remedy that the Commission can seek directly, but depends on Executive Branch action. We have a separate statutory obligation to regulate and enforce

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[79] *See, e.g.*, USTR Foreign Participation Reply Comments at 10-11.

[80] USTR Foreign Participation Comments at 7, n. 13, citing GATS Secretariat, "Initial Commitments in Trade in Services: Explanatory Note," MTN.GNS/W/164 (Sept. 3, 1994).

[81] *Id.* at 8.

[82] *Id.* at 9.

our rules that cannot be stayed while the Executive Branch seeks relief in an international tribunal.

(2) Determining a Satellite's WTO Status

Background

50. In the *Notice*, the Commission proposed to evaluate whether U.S. satellite operators have effective competitive opportunities in the market of the administration licensing or coordinating the non-U.S. satellite ("home market") before allowing that satellite access to the U.S. market. As discussed above, the Commission, in the *Further Notice*, proposed to apply a presumption of entry with respect to satellites licensed by WTO Members. This raises the possibility that satellite operators from non-WTO countries might seek to obtain a satellite license from a WTO Member -- an incentive we do not wish to create.

Positions of the Parties

51. Lockheed Martin advocates that the test to determine whether a satellite system qualifies for WTO status should be an applicant's "home market."[83] According to Lockheed Martin, an applicant's "home market" should be its principal place of business because that is where the operator is likely to have the most direct economic ties and to participate in the domestic process.[84] Orion recommends that we consider the home markets of each of the major investors in the foreign-licensed system.[85]

52. Columbia argues that the presumption in favor of entry for satellites licensed by WTO Members should not apply where the satellite is U.S.-owned.[86] Columbia's concern is that U.S. companies may acquire licenses in WTO Members to avoid the U.S. regulatory process.[87] To prevent this possibility, Columbia recommends that we require U.S. companies seeking to offer new service in the U.S. market (excluding legitimate joint ventures with existing operators) to obtain a U.S. license to initiate service, regardless of whether a non-

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[83] Lockheed Martin FNPRM Comments at 3.

[84] *Id.*

[85] Orion NPRM Comments at 8. Orion continues to believe that a home market analysis is appropriate. Orion FNPRM Comments at 6.

[86] Columbia FNPRM Comments at 6-7.

[87] *Id.* at 6-7 (submitting that the Commission "should not countenance, on the basis of sound telecommunications and trade policies, U.S.-based companies by-passing U.S. regulatory processes in favor of buying access to the orbit from lawless island states, and then obtaining access to the U.S. market by virtue of our commitments as a WTO member country").

U.S. licensee would be permitted into the market based on such a license. It claims that this approach would not disadvantage non-U.S. companies vis-a-vis domestic operators, and thus, would not violate the spirit of the WTO Basic Telecom Agreement.[88] GE Americom disagrees. It argues that the parity that it and others have advocated in this proceeding adequately assures that foreign-licensed carriers, whether U.S. entities or not, will be treated no more favorably than U.S. entities seeking U.S. licenses to provide carriage in the United States.[89]

Discussion

53. We adopt the proposal to determine the WTO status of a space station based on the country or administration that grants the license or is responsible for coordinating the system internationally. We find that this approach is the most relevant and practical way of determining WTO status for purposes of applying the presumption in favor of entry. As explained in the *Notice*, it is almost always true that the nationality of the satellite owner is the same as that of the licensing country or administration of the system and that the primary service supplier's principal place of business will be located where the satellite is licensed or coordinated.[90] We recognize that a satellite system licensed by a WTO Member may have majority investment from a non-WTO country, but do not expect this situation to be common enough to justify a departure from the predictable and administratively simple rule we proposed. In addition, we recognize that in rare situations a satellite's licensing administration simply may be a "flag of convenience" used to circumvent an ECO-Sat analysis. The U.S. obligations under the WTO Basic Telecom Agreement relate only to services and service suppliers of WTO Members; it does *not* relate to those of *non*-WTO countries. Thus, in appropriate cases, we would consider, as Lockheed Martin suggests, a system operator's principal place of business, and other relevant factors, and would not limit our inquiry to the licensing administration only.

54. We decline to adopt Columbia's proposal that we not apply the presumption in favor of competition for satellites licensed in WTO Members where the satellite is U.S.-owned.[91] Columbia's concern that some U.S. companies might acquire licenses in WTO countries to avoid the U.S. regulatory process is misplaced. Any U.S. company that obtains a license in another country and later seeks to provide satellite services in the United States will be subject to the same rules and requirements as any other applicant.[92] For example, a U.S.

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[88] *Id.* at 7.

[89] GE Americom FNPRM Reply Comments at 3 n.4.

[90] *Notice* at ¶ 24.

[91] Columbia FNPRM Comments at 6-7.

[92] *See* Section III.B.3.b.